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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF MCI WORLDCOM, INC.

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SUMMARY

MCI WorldCom supports the adoption of a federal rule requiring local carriers to pay each other symmetrical, TELRIC-based rates as compensation for terminating traffic to ISPs. Other aspects of this compensation requirement should be left to the state-supervised negotiation and arbitration process. This approach essentially would mirror the Commission's recently-validated local competition rules, which establish a federal framework that includes a significant state role in setting interconnection rates and enforcing and arbitrating agreements.

MCI WorldCom does not support the alternative approach suggested in the Notice of adopting federal rules that would govern all aspects of the negotiation and arbitration of ILEC/CLEC interconnection agreements concerning compensation for ISP-bound traffic. There is no need for the Commission to develop, implement, and enforce a whole panoply of new federal requirements to apply to this traffic. The existing statutory framework of Sections 251 and 252 of the 1996 Act, and the regulatory framework of the Local Competition Order -- explicit national standards, applied in state-administered proceedings -- should apply here as well.

First, there is no doubt that local exchange carriers legitimately incur actual costs for terminating traffic to end users, including ISPs. The Commission already has reached this conclusion in several recent decisions, including the Local Competition Order and the Declaratory Ruling, and should make the same finding in this proceeding. The central issue presented for resolution in this proceeding is what form of compensation should be adopted.

Second, reciprocal compensation is the preferred means of compensating carriers for terminating traffic. As the FCC found in the Declaratory Ruling, dial-up traffic bound for ISPs historically has been treated as local traffic for numerous applications, including access

charges, separations, and end user customer dialing. The Commission has indicated that its own policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic. In contrast, adoption of a mandatory "bill and keep" system would not compensate local carriers for the costs they incur to terminate telecommunications traffic.

Third, the Supreme Court has confirmed conclusively that the FCC has ample authority to require the states to adopt TELRIC-based rates for interconnection and UNEs. The costs of terminating traffic to ISPs should be determined in the same way that the costs of other interconnection services and UNEs are determined -- namely, through a TELRIC pricing methodology.

Fourth, the Commission's new federal rule governing compensation for ISP-bound traffic should mandate that these rates be symmetrical. In the Local Competition Order, the Commission found that requiring symmetrical rates would reduce an incumbent LEC's ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low termination rates that the incumbent LEC would pay interconnecting carriers. Symmetrical rates also are administratively easier to derive and manage than asymmetrical rates.

Fifth, the ILECs' own costs should serve as the proxy for termination rates. The Commission concluded in the Local Competition Order that it is reasonable to adopt the ILEC's transport and termination prices as a presumptive proxy for CLEC additional costs of termination, because the forward-looking economic costs should be similar in most cases. ILECs also are in a far better position than smaller carriers to conduct the necessary economic cost studies.

<u>Sixth</u>, the Commission's proxy rate range for telecommunications traffic terminating to ISPs should equal the proxy rate range for telecommunications traffic terminating to all other end users. When local exchange carriers deliver traffic to end users that are Internet service providers, those carriers incur the same transport and termination costs that are incurred when delivering local exchange traffic to other end users. Requiring that symmetrical reciprocal compensation be based on the proxy rate range for terminating local traffic will have a positive downward effect on all interconnection rates generally.

<u>Finally</u>, there is no need for the Commission to address Section 252(i) of the 1996 Act (the so-called "most favored nation" provision) at this time. MCI WorldCom believes the Commission's current rule represents a balanced approach that prevents parties from endlessly "leapfrogging" into other agreements, but also preserves fairness and flexibility. Any attempt to reconsider the substance of this particular rule, or its application in specific contexts, must be addressed in a more generalized rulemaking proceeding, and not in the context of determining the appropriate federal rule to govern compensation for ISP-bound traffic.

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COMMENTS OF MCI WORLDCOM, INC.

MCI WorldCom, Inc. ("MCI WorldCom"), by its attorneys, hereby files initial comments concerning the Notice of Proposed Rulemaking ("Notice") issued by the Commission on February 26, 1999 in the above-captioned proceeding. MCI WorldCom urges the Commission to adopt a federal rule requiring symmetrical, TELRIC-based compensation for ISP-bound traffic, while leaving the ultimate determination of actual rates to the state-supervised negotiation and arbitration process dictated by Sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act").

I. INTRODUCTION AND BACKGROUND

MCI WorldCom is a leading global telecommunications and information services company. Through its wholly-owned subsidiaries, MCI WorldCom provides its business and residential customers with a full range of facilities-based, fully integrated local, long distance, and international telecommunications and information services. In particular, MCI WorldCom currently is the second largest facilities-based interexchange carrier ("IXC") in the United States, as well as a significant facilities-based competitive local exchange carrier ("CLEC") and Internet service provider ("ISP").

On February 25, 1999, the FCC adopted a Declaratory Ruling and companion

Notice of Proposed Rulemaking in CC Docket No 96-98 concerning the jurisdiction of calls bound for Internet service providers ("ISPs"), and the appropriate inter-carrier compensation for such calls.[1] The Commission concluded in the Declaratory Ruling that the jurisdiction of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, and that this end-to-end transmission constitutes interstate telecommunications.[2] In the absence of a federal rule governing inter-carrier compensation for ISP-bound traffic, and given the historic treatment of ISP-bound traffic as local for purposes of access charges and separations, the Commission indicated that parties entering into interconnection agreements may voluntarily have agreed that such traffic should be treated as local traffic so that reciprocal compensation would apply under Sections 251 and 252 of the 1996 Act.[3] Further, even where parties do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, the Commission explained that state commissions may still determine in their arbitration proceedings that reciprocal compensation should be paid for this traffic.[4]

In the companion Notice, the Commission asks whether it should adopt a federal rule governing inter-carrier compensation for ISP-bound traffic, and what such a rule should entail. The Commission tentatively concludes that any federal rule regarding inter-carrier

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, issued February 26, 1999, appeal pending, MCI WorldCom, Inc. v. FCC, Case No. 99-1097 (D.C. Cir. 1999) (hereinafter "Declaratory Ruling" and "Notice," respectively).

[2] Declaratory Ruling at paras. 10-20.

[3] Id. at paras. 22-24.

[4] Id. at para. 25.

compensation for ISP traffic "should strongly reflect our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts."[5] The Commission notes that any compensation proposal adopted must advance three goals: (1) ensuring the broadest possible entry of efficient new competitors, (2) eliminating incentives for inefficient entry and irrational pricing schemes, and (3) providing to consumers as rapidly as possible the benefits of competition and emerging technologies.[6] Seeking comment on two alternative proposals to govern interconnection negotiations, the Commission tentatively concludes that compensation for ISP-bound traffic should be governed prospectively by interconnection agreements, negotiated and arbitrated at the state level pursuant to Sections 251 and 252 of the 1996 Act.[7] Under an alternative proposal, the FCC would adopt a set of federal rules, under which parties would negotiate concerning rates, terms, and conditions, and the FCC could act as arbitrator at some point in the negotiation process.[8] Alternative proposals are also solicited.[9]

While MCI WorldCom objects to the Commission's jurisdictional analysis of ISP-bound traffic, and has filed an appeal of that portion of the Declaratory Ruling, those objections largely will be put aside for purposes of these comments. MCI WorldCom urges the Commission to adopt a federal rule requiring carriers to compensate each other for terminating telecommunications traffic to ISPs. Such compensation should be symmetrical and reciprocal,

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[5] Notice at para. 28.

[6] Notice at para. 33.

[7] Notice at para. 30.

[8] Notice at para. 31.

[9] Notice at para. 33.

and based on a TELRIC pricing methodology applied to the incumbent local exchange carrier ("ILEC") network. Other salient details, including determination of the actual compensation rate, should be left to the state-supervised negotiation and arbitration process specified in Sections 251 and 252 of the 1996 Act.

II. MCI WORLDCOM BELIEVES THE COMMISSION LACKS JURISDICTION OVER CALLS TERMINATING TO ISPS WITHIN A LOCAL CALLING AREA

MCI WorldCom must state at the outset that it strongly disagrees with the Commission's view of the interstate nature of calls terminating to ISPs.[10] While the Commission is correct that the jurisdictional nature of communications historically has been determined by the originating and terminating end points of the communication, there is vigorous disagreement over the proper identification of one of those end points. The Commission apparently wants to ignore its own rules and precedent and treat ISPs as carriers, so that a call's

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[10] Over the past nine months, MCI WorldCom has filed a number of pleadings and ex parte letters on the issue of the jurisdictional nature of dial-up traffic to ISPs. See Ex Parte Letter from Richard S. Whitt, Director, Federal Affairs/Counsel, MCI WorldCom, Inc. to Magalie Roman Salas, Secretary, FCC, CC Docket Nos. 96-98, 98-79, 98-103, 98-161, CCB/CPD 97-30, November 4, 1998; Ex Parte Letter from Richard S. Whitt, Director, Federal Affairs/Counsel, MCI WorldCom, Inc. to Magalie Roman Salas, Secretary, FCC, CC Docket Nos. 96-98, 98-79, 98-103, 98-161, CCB/CPD 97-30, October 27, 1998; Ex Parte Letter from Richard S. Whitt, Director, Federal Affairs/Counsel, MCI WorldCom, Inc. to Magalie Roman Salas, Secretary, FCC, CC Docket Nos. 96-98, 98-79, 98-103, 98-161, CCB/CPD 97-30, October 19, 1998; Ex Parte Letter from Richard S. Whitt, Director, Federal Affairs/Counsel, WorldCom, Inc. to Magalie Roman Salas, Secretary, FCC, CC Docket Nos. 96-98, CCB/CPD 97-30, July 23, 1998.

MCI WorldCom also has filed pleadings concerning the appropriate jurisdictional treatment of Digital Subscriber Line ("DSL") service. MCI WorldCom Petition for Reconsideration, CC Docket No. 98-79, dated November 30, 1998; MCI WorldCom Comments on Direct Cases, CC Docket Nos. 98-79, 98-103, 98-161, dated September 18, 1998.

termination at an ISP's local server is viewed as merely an intermediate point of "switching" by a "carrier."[11] Among the many unfortunate ramifications of this mistaken view is that the Commission -- for the first time -- appears to have equated ISPs with carriers, and treated the unregulated Internet as just another regulated telecommunications service.

Despite MCI WorldCom's continuing concerns about this critical jurisdictional issue, it is not ripe to be reopened within the context of this particular rulemaking proceeding. Instead, MCI WorldCom's views herein assume -- only for purposes of this proceeding -- the legal and factual correctness of the Commission's jurisdictional analysis.

III. THE COMMISSION SHOULD RELY ON THE COMMERCIAL NEGOTIATION PROCESS, BUTTRESSED BY EXPLICIT NATIONAL STANDARDS, TO DETERMINE THE APPROPRIATE COMPENSATION FOR LEGITIMATE COSTS INCURRED BY LOCAL CARRIERS IN TERMINATING TRAFFIC TO ISPS

A. Consistent With The Local Competition Order, Policymakers Should Rely On The State-Supervised Commercial Negotiation Process In Conjunction With Explicit National Standards

MCI WorldCom agrees with the Commission's tentative conclusion that any federal rule regarding inter-carrier compensation for ISP traffic "should strongly reflect our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts."[12] All things being equal, it certainly is the case that "a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set

[11] Declaratory Ruling at paras. 10-12.

[12] Notice at para. 28.

by regulation."[13] This conclusion is well-supported by Section 252 of the Telecommunications Act itself, which directs ILECs and CLECs in the first instance to negotiate interconnection agreements which must be approved by the state public service commissions.[14]

At the same time, in the Local Competition Order the Commission recognized the obvious fact that ILECs have no economic incentive to interconnect with potential competitors. Because CLECs' attempts to secure interconnection agreements with ILECs are not carried out in a balanced environment, the Commission stated that the resulting negotiations:

> are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires.... The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power...."[15]

Certainly Section 252(b) of the 1996 Act recognizes the likelihood that negotiating parties would need to bring open issues to the state commissions for compulsory arbitration.[16]

The Commission in August 1996 determined that the best way to achieve a balance between reliance on the negotiation process and the need for rules "equalizing bargaining power" was to promulgate national rules containing minimum requirements that would apply to the interconnection arrangements established between ILECs and CLECs. These rules covered both interstate and intrastate aspects of interconnection, and were binding on the states. However, under this approach, the states still are free to adopt further rules which could

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[13] Notice at para. 29.

[14] 47 U.S.C. Section 252(a).

[15] Local Competition Order at para. 55.

[16] 47 U.S.C. Section 252(b).

complement and supplement the federal rules.[17]

The Commission's interconnection pricing policies also reflect an understanding of the feasible limits of the negotiation process. In the Local Competition Order, the FCC determined that it was within its discretion to adopt national pricing rules to ensure that rates will be just, reasonable, and nondiscriminatory, while the states could establish specific rates where parties failed to agree.[18] The Commission ultimately adopted default proxy rates for the states to use.

The Supreme Court upheld the Commission's authority to adopt rules governing ILEC-CLEC interconnection arrangements, including national pricing standards.[19] The Court declared that the Commission possesses ample authority under the 1996 Act to promulgate and enforce rules implementing the Act's local competition provisions. The Court found in particular that the Commission's rulemaking authority extends to establishing costing and pricing methodologies for interstate and intrastate services and elements, stating:

> The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in Section 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.... We hold, therefore, that the Commission has jurisdiction to design a pricing methodology.[20]

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[17] Id. at paras. 66-68, 83-84.

[18] Id. at para. 111.

[19] AT&T Corp. et al. v. Iowa Utilities Board, 119 S.Ct. 721, 142 L. Ed. 2d 834, 1999 WL 24568 (US) (Jan. 25, 1999).

[20] Id., 142 L. Ed. 2d at 852.

Thus, MCI WorldCom believes that the Commission should proceed down the local competition pathway it already decided to take in the Local Competition Order. Consistent with its newly-validated rules, the Commission should rely on the use of explicit national standards, in conjunction with the state-supervised commercial negotiations process.

B. Terminating Carriers Must Be Compensated For Costs Incurred

In the Notice, the FCC correctly acknowledges that -- no matter what compensation system ultimately is adopted -- "LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network."[21] This view is entirely consistent with the Local Competition Order, which concludes that "carriers incur costs in terminating traffic that are not de minimis...."[22] Under the FCC's own rules and longstanding precedent, ISPs are end user customers of telecommunications services, and carriers have every right to recover the legitimate costs of delivering traffic to those customers. Under the current regulatory dichotomy, when a call to an end user is completed by two or more interconnecting carriers, those carriers are compensated for carrying that traffic through either reciprocal compensation or access charges.[23] The salient point is that the terminating carrier is owed some form of compensation for the costs it incurs.

The Commission observes that it currently has no rule governing compensation

[21] Notice at para. 29.

[22] Local Competition Order at para. 1112.

[23] Declaratory Ruling at para. 9.

between two or more interconnecting carriers for completing a call to ISPs.[24] In the absence of such a federal rule governing ISP-bound traffic, the Commission points out that the state commissions have had no choice but to establish an inter-carrier compensation mechanism and decide when reciprocal compensation should be paid.[25] None of this suggests that no compensation should be paid to terminating carriers; instead, the only question is <u>what</u> payment mechanism to adopt.

Thus, in looking at the appropriate federal rule to adopt in this proceeding, the Commission should keep in mind two important policy points: (1) where possible, commercial negotiations, buttressed by explicit national standards, should be relied upon to determine compensation rates, and (2) some form of compensation is owed to LECs to recover the costs of terminating traffic to ISPs.

IV. THE COMMISSION SHOULD ADOPT A FEDERAL RULE REQUIRING SYMMETRICAL, TELRIC-BASED TERMINATION COMPENSATION RATES, WHILE LEAVING OTHER SALIENT DETAILS TO THE STATE-SUPERVISED NEGOTIATION AND ARBITRATION PROCESSES

MCI WorldCom agrees with the Commission's tentative conclusion that compensation for terminating ISP-bound traffic should be determined in the interconnection agreements negotiated and arbitrated by ILECs and CLECs under Sections 251 and 252 of the 1996 Act. At the same time, as in the <u>Local Competition Order</u>, the FCC should adopt a explicit national range of TELRIC-based proxy rates, in this case a symmetrical reciprocal

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[24] <u>Id</u>.

[25] <u>Notice</u> at para. 26.

compensation rate based on the ILEC local termination rate.

A. LECs Should Pay Reciprocal Compensation For Terminating Traffic To ISPs

Section 251(b)(5) of the 1996 Act requires that all LECs pay reciprocal compensation "for the transport and termination of telecommunications."[26] Section 252(d)(2) further dictates that reciprocal compensation should be based on "a reasonable approximation of the additional costs of terminating such calls."[27] Together, these provisions acknowledge that costs are incurred for terminating telecommunications, and that reciprocal compensation is the preferred means of compensating carriers for such termination.

While the Commission has indicated that Section 251(b)(5) does not apply to ISP-bound traffic as a legal matter,[28] this conclusion -- which MCI WorldCom believes is not well-founded jurisdictionally -- does not, and should not, mean that reciprocal compensation is not owed for ISP-bound traffic. As the FCC found in the Declaratory Ruling, dial-up traffic bound for ISPs historically has been treated as local traffic for numerous applications, including access charges, separations, and end user customer dialing. Indeed, the Commission took great pains to stress that "our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such

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[26] 47 U.S.C. Section 251(b)(5). In turn, the Commission has defined "termination" as "switching of traffic at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." Local Competition Order at para. 1040.

[27] 47 U.S.C. Section 252(d)(2).

[28] Declaratory Ruling at paras. 25, 26 n.87.

compensation is due for that traffic."[29] MCI WorldCom agrees.

In contrast, MCI WorldCom strongly opposes adoption of a mandatory "bill and keep" system because it would not compensate local carriers for the costs they incur to terminate telecommunications traffic. It is instructive that under the FCC's own local competition rules, the states can impose "bill and keep" only if (1) the presumption of symmetrical rates is overcome, and (2) traffic between the carriers is in balance.[30] The Commission also found that "bill and keep" arrangements that lack any provisions for compensating carriers for the costs they incur in terminating traffic do not provide for recovery of costs.[31]

Of course, the Commission need not prohibit parties from adopting "bill and keep" in lieu of a reciprocal compensation mechanism. Individual parties can voluntarily agree to adopt a "bill and keep" mechanism, or any other type of compensation mechanism; indeed, the FCC has acknowledged that nothing in the 1996 Act prevents parties from agreeing to "bill and keep" arrangements on their own.[32] However, neither the FCC nor the states should mandate such an arrangement.

B. Compensation Rates Should Be Based On TELRIC

In the Local Competition Order, the Commission adopted a forward-looking, economic cost-based pricing standard for interconnection and pricing of unbundled network

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[29] Declaratory Ruling at para. 25.

[30] Local Competition Order at para. 1111.

[31] Id. at para. 1112.

[32] Id. at para. 1113.

elements ("UNEs").[33] The FCC further concluded that the carrier actually providing the termination facility is entitled to a compensation rate, based on the TELRIC cost of providing the portion of the facility used for terminating traffic that originates on the network of a competing carrier.[34]

As indicated above, the Supreme Court has confirmed conclusively that the FCC has ample authority to require the states to adopt TELRIC-based rates for interconnection and UNEs. In MCI WorldCom's view, the costs of terminating traffic to ISPs should be determined in the same way that the costs of other interconnection services and UNEs are determined -- namely, through a TELRIC pricing methodology.

C. Actual Compensation Rates Should Be Determined In State-Supervised Negotiations Or Arbitrations

MCI WorldCom does not support the alternative approach suggested in the Notice of adopting federal rules governing the negotiation and arbitration of ILEC/CLEC interconnection agreements concerning compensation for ISP-bound traffic. There is no need for the Commission to develop, implement, and enforce a whole panoply of new federal requirements to apply to this traffic. The existing statutory framework of Sections 251 and 252 of the 1996 Act, and the regulatory framework of the Local Competition Order -- explicit national standards, applied in state-administered proceedings -- should apply here as well.

The Notice itself presents one compelling reason to avoid adopting federal

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[33] Id. at para. 1054.

[34] Id. at para. 1063.

negotiation and arbitration rules. The FCC asks for comment on a wide variety of unresolved issues inherent in this approach, including:

- how such an approach would operate procedurally;
- what costing standards should be used in arbitrating disputes;
- how this proposal compares to a broad interconnection negotiation in which most disputes are resolved by a state arbitrator, but disputes regarding ISP-bound traffic would be resolved through a federal arbitration-like process;
- whether it is possible as a technical matter to segregate intrastate and interstate ISP-bound traffic;
- whether the federal rules should apply to all intrastate and interstate ISP-bound traffic;
- whether the FCC has authority to establish an arbitration process that binds the parties and is not subject to judicial review;
- whether and how parties should select the arbitrator, as opposed to having a federal or state decisionmaker; and
- whether there are any issues that the FCC could and should address in the first instance through rules, rather than through arbitration; and if so, the substance and specificity of such rules.[35]

All of these thorny problems could be avoided entirely if the Commission simply adopts its tentative conclusion and utilizes the existing federal/state framework contained in its local competition rules.

In a similar vein, the Commission asks whether it should adopt rules for ISP-bound interstate traffic that would coexist with state rules governing ISP-bound intrastate traffic, or whether it is too difficult or inefficient to separate such traffic.[36] Again, the Commission

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[35] Notice at paras. 31-34.

[36] Notice at para. 36.

need not go down this path. Certainly the Commission is correct to seriously question the significant technical and practical implications of requiring separation of traffic between the federal and state jurisdictions. MCI WorldCom believes the technical inseverability problems that appear to be inherent in the nature of ISP-bound traffic makes it infeasible to attempt to fashion different federal and state regimes. In the Declaratory Ruling, the Commission found that ISP-bound traffic is jurisdictionally mixed because some traffic is intrastate, while other traffic is interstate.[37] The Commission noted that, during the course of a single ISP session, a customer might interact with content contained on servers physically located within the same state (intrastate), in another state (interstate), or another country (international). This same finding was presented to the Eight Circuit in the appeal of the FCC's federal access charge rules. There, the Eighth Circuit acknowledged the Commission's claim that it was "impractical, if not impossible" to separate the interstate and intrastate components, and concluded that the Commission "cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate....[38] Thus, because ISP-bound traffic is mixed and inseverable, the Commission should not attempt to devise a separate set of rules designed for interstate traffic.[39] Instead, state-derived rates for ISP traffic -- consistent with federal compensation policy -- should apply, no matter the ultimate jurisdiction of ISP-bound traffic.

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[37] Declaratory Ruling at paras. 18-19.

[38] Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523, 543 (8th Cir. 1998).

[39] Moreover, the costs of terminating ISP-bound traffic should be the same, regardless of the assigned jurisdiction.

D. Compensation Rates Should Be Symmetrical And Based On The ILEC's Forward-Looking Costs

The Commission's new federal rule governing compensation for ISP-bound traffic should mandate that these rates be symmetrical. In the Local Competition Order, the Commission found that requiring symmetrical rates would "reduce an incumbent LEC's ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low termination rates that the incumbent LEC would pay interconnecting carriers."[40] Symmetrical rates also are administratively easier to derive and manage than asymmetrical rates.[41]

The Commission also concluded in the Local Competition Order that it is reasonable to adopt the ILEC's transport and termination prices as a presumptive proxy for CLEC additional costs of termination.[42] This is because "the forward-looking economic costs should be similar in most cases."[43] Moreover, the Commission determined that ILECs are in a far better position than smaller carriers to conduct the necessary economic cost studies.[44] In fact, because ILECs, alone among local carriers, enjoy considerable economies of scale, scope, and density in provisioning services, it is quite possible that CLECs' costs of terminating traffic could be significantly higher than the ILECs' termination costs. Under these circumstances, the

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[40] Local Competition Order at para. 1087.

[41] Id. at para. 1088.

[42] Id. at para. 1085.

[43] Id.

[44] Id.

ILECs' costs surely are more than a reasonable proxy for CLEC costs.[45]

E. Compensation Rates Should Be No Lower Than The Proxy Rates For Local Voice Termination

Finally, the Commission's proxy rate range for telecommunications traffic terminating to ISPs should equal the proxy rate range for telecommunications traffic terminating to all other end users. When local exchange carriers deliver traffic to end users that are Internet service providers, those carriers incur the same transport and termination costs that are incurred when delivering local exchange traffic to other end users. Certainly no party has demonstrated that the costs of terminating calls to ISPs are different than the costs of terminating calls to other end users. In another context, the Commission readily endorsed the viewpoint that "a minute is a minute;" indeed, "applying separate regulatory regimes ... with divergent requirements to parties using essentially the same equipment to transmit and route traffic is undesirable in light of the new procompetitive paradigm created by section 251."[46] The same local network infrastructure is being used to terminate calls, so the same costs should be incurred.

In addition, ISPs are just like other end users which utilize telecommunications as an input to their businesses. ISPs are not unlike many other types of end users, such as call centers, ticket service providers, or hotel reservation lines, which have significant inbound traffic. Any federal rule which calls for different treatment of one class of end users (ISPs) vis-

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[45] Indeed, the Commission determined in the Local Competition Order that a CLEC still would have the right to rebut the ILEC's presumptive symmetrical rate by filing its own cost study. Id. at para. 1089.

[46] Local Competition Order at para. 185.

a-vis another class of end users would be blatantly discriminatory.

Moreover, the difficulty and cost in measuring and segregating voice and data traffic also warrants using the local voice rate as the same rate for ISP traffic. MCI WorldCom is unaware of any technically feasible way of distinguishing between voice bits and data bits in an increasingly-packetized telecommunications world.

As indicated above, the Commission has found that symmetrical reciprocal compensation is the best means of compensating local carriers for the costs they incur in terminating telecommunications traffic. This same principle should apply to ISP-bound traffic as well. In reality, the only difference between ISP-bound traffic and all other types of terminating traffic is the recipient of the majority of the resulting compensation. This fact, however, is no reason to abandon the Commission's costing principles in this one instance. It is instructive that, in numerous state-run cost study proceedings across the country, the ILECs have argued that the cost of terminating local traffic far exceeds the proxy rates established by the Commission. Only in the case of reciprocal compensation for ISP-bound traffic, however, do the ILECs suddenly claim that the termination costs either do not exist, or should be treated in a wholly different manner.

In its Local Competition Order, the Commission adopted a series of proxy rate ranges for interconnection and UNEs. In the case of local termination, the Commission found that a range of between 0.2 and 0.4 cents per minute should apply for calls handed off at the end office switch, based on the same proxies that apply to local switching as a UNE.[47] The Commission further determined that a carrier's termination at a tandem -- which includes

[47] Local Competition Order at para. 1060.

incurring costs for tandem switching and tandem transport -- should generate compensation at an additional default proxy rate of 0.15 cents per minute.[48] Thus, termination of traffic involving LEC end offices and tandems yields a proxy range of between 0.35 and 0.55 cents per minute.

In MCI WorldCom's view, if this range of rates is good enough when the ILECs overwhelmingly are on the receiving end of compensation, it is more than good enough in the single instance where the ILECs may be net payors. Among other benefits, this approach will have a positive downward effect on interconnection rates generally. If the ILECs are compelled to pay symmetrical reciprocal compensation based on the results of their own TELRIC studies, and those same cost studies are used to determine all interconnection rates, the ILECs may be incented to file cost studies supporting interconnection rates lower than those currently adopted in the states.

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Thus, MCI WorldCom recommends that the Commission adopt the following federal rule:

1. When a local exchange carrier delivers traffic to end users that are Internet service providers, the local exchange carrier incurs the same transport and termination costs that it incurs when delivering local exchange traffic to other end users.

2. Local exchange carriers are to be compensated for delivering traffic to Internet service providers by the local exchange carrier on whose network the calls originated. The carriers are prohibited from adopting carrier access-like arrangements that would require the compensation to be paid by the Internet service provider or other end users.

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[48] Id. at para. 824.

3. Compensation shall be set at the same reciprocal compensation rate applied to local exchange traffic. This rate is to be based upon the incumbent local exchange carrier's total element long-run incremental (TELRIC) cost of terminating local exchange traffic. Where the local exchange carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the incumbent LEC tandem rate. CLECs shall not be required to provide their own cost studies.

4. Such rates shall be established under interconnection agreements negotiated and arbitrated pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, and applicable Commission regulations.

This proposed rule would best advance the Commission's goals in this proceeding. First, the rule will ensure the broadest possible entry of efficient new competitors, by allowing CLECs to recover their legitimate costs of doing business. Second, the rule will eliminate incentives for inefficient entry and irrational pricing schemes, by basing the rates for compensation on the TELRIC pricing methodology. In particular, setting up a two-tiered compensation scheme (one for ISP traffic, one for all other end user traffic) for the same functionality will undoubtedly lead to arbitrage and potential manipulation by the ILECs. By definition, TELRIC should lead to a single network cost. Third, the rule will provide to consumers as rapidly as possible the benefits of competition and emerging technologies. In particular, allowing CLECs to receive compensation for terminating traffic to ISPs will enable CLECs to continue to serve those particular users, which in turn leads to increased competition, lower prices, higher quality of services, and speedier deployment of innovative services. In short, vibrant local competition will directly benefit customers.

MCI WorldCom's proposed rule would have several other public policy benefits as well. First, the rule would be consistent with other local competition rules; in particular, it would leave states the important role of determining actual rates. Second, the rule would be consistent with the local treatment of traffic for other purposes. MCI WorldCom shares the Commission's obvious concerns about the impact of its jurisdictional finding on the separations regime, and heartily agrees that the Commission should not embrace a policy that will lead to a mismatch between different jurisdictions of the associated costs and revenues of ISP-bound traffic.[49] By adopting a rule along the lines suggested by MCI WorldCom, the Commission need not deal with the enormous implications of other types of compensation proposals on its separations rules.

V. THE FCC NEED NOT REEXAMINE THE MFN PROVISION IN THE CONTEXT OF THIS PROCEEDING

The FCC seeks comment on the applicability of Section 252(i) of the Act, the so-called "most favored nation" ("MFN") clause, under which parties can select provisions from other parties' interconnection agreements. In particular, the FCC queries whether and how MFN rights affect parties' ability to negotiate or renegotiate the terms of their interconnection agreements.[50]

The Commission's current rule states that an ILEC must make available to any requesting carrier "any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party" on "the same rates, terms, and conditions as those provided in the agreement."[51] The Supreme Court validated this rule in the Iowa Utilities Board decision.

[49] Notice at para. 36.

[50] Notice at para. 35.

[51] 47 C.F.R. Section 51.809.

First, it is crucial to distinguish between situations where carriers negotiate, execute, and exercise MFN clauses contained in their interconnection agreements, and situations where carriers exercise their statutory rights under Section 252(i) of the Act. Any problems with particular MFN agreement language can be corrected through the standard negotiation and arbitration process, and should not form the basis for a revised approach to statutory language.

Second, Section 252(i) must continue to serve its key functions. First and foremost, this provision's primary role is to ensure the nondiscriminatory treatment of competitive LECs by incumbent LECs. The provision also provides an important limitation on the bargaining power of the incumbent LECs, which could otherwise tie the terms of desirable provisions to objectionable conditions and thereby limit the group or industry segment which could gain the benefit of those terms. This limitation on what would otherwise be the unrestricted bargaining power of a dominant, if not monopolistic, market participant is entirely proper. Effectively, Section 252(i) makes it difficult for an incumbent LEC to limit a particular "interconnection, service, or network element" to the incumbent's favored interconnecting carriers, and that result is entirely appropriate.

Third, MCI WorldCom respectfully submits that the Commission must be wary of creating a cure potentially worse than the affliction. The operations and lifetimes of interconnection agreements are extraordinarily complex things, and many factors could affect any artificial or arbitrary limitations on Section 252(i) rights. Because negotiating parties are appropriately given considerable freedom to enter into interconnection agreements, other parties must also have great freedom to elect to opt into provisions of those agreements under Section 252(i). In an illustrative example, an incumbent LEC could sign a twenty year, vaguely worded agreement with one of its affiliates. Until other LECs have a chance to observe how the agreement language is construed and applied, there has been no reasonable opportunity to make a decision on such an election.

It is also important to note that Section 252(i) applies to interconnections, services, and network elements "provided under an agreement." Even if an agreement has passed its initial expiration term, but services and elements are still being provided under an "evergreen clause," those services and elements must be available to others for at least as long as they are available to the initial party to the agreement. Otherwise, parties could sign a six week agreement with an "evergreen clause" and limit its availability to any carrier which did not sign up in the first six weeks. While MCI WorldCom does not advocate the endless availability of provisions under Section 252(i), ILEC services and elements should be available to other carriers for as long as the initial party obtains them under the interconnection agreement in question.

MCI WorldCom was a strong original supporter of the Commission's rule because it represents a balanced approach that prevents parties from endlessly "leapfrogging" into other agreements, but also preserves fairness and flexibility. Any attempt to reconsider the substance of this particular rule, or its application in specific contexts, must be addressed in a more generalized rulemaking proceeding, and not in the context of determining the appropriate federal rule to govern compensation for ISP-bound traffic.

VI. CONCLUSION

The Commission should adopt a federal rule requiring symmetrical, TELRIC-based reciprocal compensation for ISP-bound traffic, while leaving the ultimate determination of actual rates to the state-supervised negotiation and arbitration processes dictated by Sections 251 and 252 of the Telecommunications Act of 1996.

Respectfully submitted,

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April 12, 1999

CERTIFICATE OF SERVICE

I, M. Cristina Ayala, hereby certify that I have this 12th day of April, 1999, sent a copy of the foregoing "Comments of MCI WorldCom, Inc." in CC Docket No. 99-68, by hand delivery, to the following:

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